

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

LASHEENA SIPP-LIPSCOMB AND : **CIVIL ACTION NO. 20-cv--01926**
ANDRES GARDIN, SR., Individually and in :
their own right and as Parents and Natural :
Guardians of ANDRES GARDIN, JR., a minor :

V. :

EINSTEIN PHYSICIANS PENNYPACK :
PEDIATRICS, et al :

ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of Defendants, Charles W. Concodora, M.D. and Urology for Children's, Motion *in Limine* to preclude any speculative and irrelevant testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and that recording his note four days later was a violation of the standard of care, and any response thereto, it is hereby **ORDRED** and **DEREED** that said Motion is **GRANTED**.

It is further **ORDERED** and **DECREED** that Plaintiffs are precluded from offering, referring to or otherwise introducing any speculative testimony and/or argument regarding the reason why Dr. Concodora recorded his note four days after the alleged negligence at the time of trial.

It is further **ORDERED** and **DECREED** that Plaintiffs are precluded from offering, referring to or otherwise introducing any testimony and/or argument that it was a violation of the

standard of care that Dr. Concodora recorded his note four days after the alleged negligence at the time of trial.

BY THE COURT:

MICHAEL M. BAYLSON, J.

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

LASHEENA SIPP-LIPSCOMB AND ANDRES GARDIN, SR., Individually and in their own right and as Parents and Natural Guardians of ANDRES GARDIN, JR., a minor	:	CIVIL ACTION NO. 20-cv--01926
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	:	
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**MOTION *IN LIMINE* OF DEFENDANTS, CHARLES W. CONCODORA, M.D. AND
UROLOGY FOR CHILDREN, TO PRECLUDE ANY SPECULATIVE AND
IRRELEVANT TESTIMONY AND/OR ARGUMENT RELATING TO THE REASON
WHY DR. CONCODORA RECORDED HIS NOTE FOUR DAYS AFTER THE
ALLEGED NEGLIGENCE AND THAT RECORDING HIS NOT FOUR DAYS LATER
WAS A VIOLATION OF THE STANDARD OF CARE**

Defendants, Charles W. Concodora, M.D. and Urology for Children, by and through their attorneys, German Gallagher and Murtagh, P.C., hereby move to preclude Plaintiffs from introducing any speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the date of the alleged negligence and that recording his note four days later was a violation of the standard of care at the time of trial.

I. FACTS

This matter arises out of Plaintiffs' allegations that the Defendants were negligent which caused a delay in the diagnosis and treatment of the Minor Plaintiff's testicular torsion. Plaintiffs' sole claim against Moving Defendant, Dr. Concodora, is for negligence. Plaintiffs' sole theory of liability against Moving Defendant, Urology for Children, is for vicarious liability for the alleged negligence of Dr. Concodora.

During Dr. Concodora's deposition on July 29, 2021, Plaintiff questioned Dr. Concodora as to why he wrote his attending note four days later. Specifically, he was questioned and testified as follows:

14 Q. And when did you cosign Dr. Cho's note?

15 A. I believe that was on July 28.

16 Q. And so at no time prior to July 28 did you
17 review the medical records?

18 A. Correct.

19 Q. And the medical records were also including
20 the ultrasound images?

21 A. Correct.

22 Q. Is there any reason why you didn't review them
23 prior to the 28th?

24 A. So the -- at the time of the emergency

1 department consult, I had been given information
2 directly from Dr. Cho during a telephone
3 conversation and based on our conversation, the
4 standard of care was met and there was sufficient
5 information at that time.

6 Q. Is the information that you were given by
7 Dr. Cho accurately and completely recorded in your
8 note, in your attending note that you signed?

9 A. Are you talking about my addendum?

10 Q. I'm talking about the attending note that you
11 cosigned.

12 A. I don't -- Mr. Jokelson, I do not cosign an
13 attending note. I cosign a resident's note. I
14 would put down the attending addendum. That would
15 be my portion of the note.

See Exhibit A at pgs. 42:-14-24 - 43:1-15

2 Q. But you wrote your note four days later?

3 A. Correct, and my note was written based off of
4 my phone conversation with Dr. Cho and nothing
5 else.

6 Q. Did you take notes of that phone conversation?

7 A. No.

8 Q. And you remembered everything that happened in
9 that phone conversation, enough to write a note
10 about it four days later?

11 A. Enough to write that note, yes. What I wrote
12 in that note is factual and based on the
13 conversation.

14 Q. How many patients have you seen in the
15 interim?

16 A. I don't know.

17 Q. Twenty or less?

18 A. I don't know.

19 Q. Did you see any?

20 A. Yes.

21 Q. Were you -- did you see patients after 8:00
22 a.m. on the 24th of July, on that day?

23 A. Yes.

24 Q. Did you perform surgery that day?

1 A. I'd have to check my schedule. I don't know.

2 Q. Did you see patients on the 25th?

3 A. I'd have to check my schedule.

4 Q. Did you see them on the 26th?

5 A. Same answer. I'd have to check my schedule.

6 Q. And the same answer would be for the 27th or
7 the 28th?

8 A. That would be correct.

9 Q. But you're certain you made no notes of your
10 conversation with Dr. Concodora?
11 A. You mean Dr. Cho?
12 Q. I meant Dr. Cho. Thank you for correcting my
13 mistake.
14 A. Correct.
15 Q. And you just wrote your note from your memory
16 entirely?
17 A. Correct.
18 Q. And I think you said before, unless I'm
19 misunderstanding, that you don't recall having any
20 conversations with Dr. Balsara?
21 A. Correct.
22 Q. And you never spoke to the patient in this
23 case or his parents?
24 A. Correct.

See Exhibit A at pgs. 81:2-24 - 82:1-24

Additionally, at the Mediation in this matter, Plaintiff's counsel argued that it was a violation of the reporting requirements and he implied that this violated the standard of care because Dr. Concodora recorded his note four days after the alleged negligence.

Thus, Moving Defendants anticipate that Plaintiffs will attempt to introduce speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the date of the alleged negligence and/or that recording his note four days later was a violation of the standard of care. However, the timing of when Dr. Concodora recorded his note is irrelevant and therefore, Moving Defendants file the instant Motion *in Limine*.

II. LEGAL ARGUMENT

A. Speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and/or implying that that recording his note four days later was a violation of the standard of care is irrelevant, not rationally based, and is not helpful to determining a fact in issue.

Under Fed. R. Evid. 401, evidence is relevant if it: (1) has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action. Evidence that is irrelevant is not admissible. Fed. R. Evid. 402.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. Under Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The reliability prong requires expert testimony to be “based on the methods and procedures of science, not on subjective belief and unsupported speculation.” *Karlo v.*

Pittsburgh Glass Works, LLC, 849 F.3d 61, 81 (3d Cir. 2017) (quoting *In re TMI Litig.*, 193 F.3d

613, 703-07 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir. 2000).

Here, speculative testimony and/or argument as to why Dr. Concodora recorded his note in the Plaintiff's medical records four days later is entirely irrelevant to the issue of whether the defendants exercised the requisite standard of care at the time of the minor Plaintiff's care. Such testimony and/or argument is unreliable, not rationally based, and is not helpful to clearly understand a witness's testimony or to determining a fact in issue.

Additionally, Plaintiff has not produced any expert testimony stating that it was a violation of the standard of care for Dr. Concodora to record his note four days after the alleged negligence. Further, even if Plaintiff had produced such expert testimony, it is not relevant to the issue of causation as it would not have changed the ultimate outcome of this case. Testimony and/or argument alleging or implying that recording his note four days later was a violation of the standard of care is irrelevant. The timing of when Dr. Concodora recorded his note is irrelevant as the treatment had already occurred. Thus, when the note was written did not have any effect on the outcome of this case. The minor Plaintiff's parents were called within hours of Dr. Concodora (when another radiologist did a second read of the ultrasound) and treatment was begun. Thus, Dr. Concodora's note would have been the same note if it was entered immediately after his phone call consult or four days later.

Therefore, any speculative testimony and/or argument as to why Dr. Concodora wrote his note four days after the alleged negligence and/or any testimony and/or argument that recording his note four days later was a violation of the standard of care is irrelevant and has no probative value and no bearing whatsoever on the issue the jury is to decide: whether the defendants conduct with respect to the minor Plaintiff's care fell below the standard of care. Introduction of such testimony and/or argument would serve no legitimate purpose. Plaintiff's only intention to

introduce such testimony and/or argument would be to divert the jury's attention away from the real issues in the case. Thus, admitting such would only serve to confuse the jury and divert their attention away from the specific issues in this case. As such, the Court should not permit such irrelevant evidence at trial. *See* Fed. R. Evid. 402

B. Any probative value of speculative and irrelevant testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and that recording his note four days later was a violation of the standard of care is outweighed by a danger of undue prejudice.

Even if Plaintiff's anticipated speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and/or that recording his note four days later was a violation of the standard of care was relevant (which it is not), it should nonetheless be excluded under Fed. R. Evid. 403, which provides that:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Allowing the jury to hear speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and/or that recording his note four days later was a violation of the standard of care would unfairly prejudice the Defendants, as this information could cause the jury to view Moving Defendants in an unfavorable light. Any purported value of such speculative and irrelevant testimony and/or argument will inevitably prejudice, confuse and mislead the jury against Moving Defendants. Moreover, it will cause undue delay and waste the jury's time, as such information is not dispositive of the issue before the jury. As such, the Court should not permit such evidence at trial.

III. CONCLUSION

For the reasons set forth above, Defendants, Charles W. Concodora, M.D. and Urology for Children, respectfully request that the Court grant their Motion *in Limine* and preclude any speculative and irrelevant testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and that recording his note four days later was a violation of the standard of care at the time of trial.

GERMAN, GALLAGHER & MURTAGH

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Attorneys for Defendants,
Charles W. Concodora, M.D. and
Urology for Children

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**MEMORANDUM RE: MOTION IN LIMINE OF DEFENDANTS, CHARLES W.
CONCODORA, M.D. AND UROLOGY FOR CHILDREN, TO PRECLUDE ANY
SPECULATIVE AND IRRELEVANT TESTIMONY AND/OR ARGUMENT RELATING
TO THE REASON WHY DR. CONCODORA RECORDED HIS NOTE FOUR DAYS
AFTER THE ALLEGED NEGLIGENCE AND THAT RECORDING HIS NOT FOUR
DAYS LATER WAS A VIOLATION OF THE STANDARD OF CARE**

This matter arises out of Plaintiffs' allegations that the Defendants were negligent which caused a delay in the diagnosis and treatment of the Minor Plaintiff's testicular torsion.

Plaintiffs' sole claim against Moving Defendant, Dr. Concodora, is for negligence. Plaintiffs' sole theory of liability against Moving Defendant, Urology for Children, is for vicarious liability for the alleged negligence of Dr. Concodora.

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Additionally, at the Mediation in this matter, Plaintiff's counsel argued that it was a violation of the reporting requirements and he implied that this violated the standard of care because Dr. Concodora recorded his note four days after the alleged negligence.

Thus, Moving Defendants anticipate that Plaintiffs will attempt to introduce speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the date of the alleged negligence and/or that recording his note four days later was a violation of the standard of care. However, the timing of when Dr. Concodora recorded his note is irrelevant and therefore, Moving Defendants file the instant Motion *in Limine*.

ANALYSIS

A. Speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and/or implying that that recording his note four days later was a violation of the standard of care is irrelevant, not rationally based, and is not helpful to determining a fact in issue.

Under Fed. R. Evid. 401, evidence is relevant if it: (1) has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action. Evidence that is irrelevant is not admissible. Fed. R. Evid. 402.

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- (g) the testimony is the product of reliable principles and methods; and
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Additionally, Plaintiff has not produced any expert testimony stating that it was a violation of the standard of care for Dr. Concodora to record his note four days after the alleged negligence. Further, even if Plaintiff had produced such expert testimony, it is not relevant to the issue of causation as it would not have changed the ultimate outcome of this case. Testimony and/or argument alleging or implying that recording his note four days later was a violation of the standard of care is irrelevant. The timing of when Dr. Concodora recorded his note is irrelevant as the treatment had already occurred. Thus, when the note was written did not have any effect on the outcome of this case. The minor Plaintiff's parents were called within hours of Dr. Concodora (when another radiologist did a second read of the ultrasound) and treatment was begun. Thus, Dr. Concodora's note would have been the same note if it was entered immediately after his phone call consult or four days later.

Therefore, any speculative testimony and/or argument as to why Dr. Concodora wrote his note four days after the alleged negligence and/or any testimony and/or argument that recording his note four days later was a violation of the standard of care is irrelevant and has no probative value and no bearing whatsoever on the issue the jury is to decide: whether the defendants conduct with respect to the minor Plaintiff's care fell below the standard of care. Introduction of such testimony and/or argument would serve no legitimate purpose. Plaintiff's only intention to

introduce such testimony and/or argument would be to divert the jury's attention away from the real issues in the case. Thus, admitting such would only serve to confuse the jury and divert their attention away from the specific issues in this case. As such, the Court should not permit such irrelevant evidence at trial. *See* Fed. R. Evid. 402

B. Any probative value of speculative and irrelevant testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and that recording his note four days later was a violation of the standard of care is outweighed by a danger of undue prejudice.

Even if Plaintiff's anticipated speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and/or that recording his note four days later was a violation of the standard of care was relevant (which it is not), it should nonetheless be excluded under Fed. R. Evid. 403, which provides that:

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CONCLUSION

For the reasons set forth above, Defendants, Charles W. Concodora, M.D. and Urology for Children, respectfully request that the Court grant their Motion *in Limine* and preclude any speculative and irrelevant testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the alleged negligence and that recording his note four days later was a violation of the standard of care at the time of trial.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion *in Limine* of Defendants, Charles W. Concodora, M.D. and Urology for Children, to preclude Plaintiffs from introducing any speculative testimony and/or argument relating to the reason why Dr. Concodora recorded his note four days after the date of the alleged negligence and that recording his note four days later was a violation of the standard of care at the time of trial was filed with the Court on December 8, 2022 and was served upon all counsel of record via the Court's ECF System.

GERMAN, GALLAGHER & MURTAGH

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